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No. 89-1368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Brief in Opposition of the Federal Energy Regulatory Commission makes no effort whatsoever to defend the correctness of the Commission's restrictive view of its jurisdiction over arms-length utility contracts, even though that view entails legal determinations of possible critical importance to the electric utility industry and to regulatory law. The Commission argues that this Court need not concern itself with the soundness of the Commission's new interpretation of its obligations under the Federal Power Act because the Commission purported to

decide certain factual aspects of the case (as an alternative to its holding that it had no jurisdictional duty to do so) in the favor of the other party to the contract here in question.

This circumstance, even assuming that it in fact occurred (*but see infra* ¶ 2), supports grant of *certiorari* and review of the Commission's erroneous and impermissibly narrow view of its own jurisdiction. It is virtually certain that the Commission will continue in future cases to deny its jurisdictional responsibilities in these areas, and its administrative law judges and the industry must perforce accept these pronouncements as the controlling law. *See, e.g., Public Serv. Co. of New Mexico*, 43 FERC (CCH) ¶ 61,469 (1988), *petition for review pending sub nom. San Diego Gas & Elec. Co. v. FERC*, No. 88-1744 (D.C. Cir. argued April 17, 1990). The Commission may also again make factual findings, purportedly obviating the need to decide the legal issues; in the Commission's view, such action would avoid judicial review and reversal of its indefensibly narrow construction of its statutory responsibilities.[1]

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[1] We are not suggesting here that the Commission's findings referred to in the Brief in Opposition were a conscious attempt to avoid future judicial scrutiny of its jurisdictional holdings, but rather that, in making those findings, the Commission was influenced and limited by its strong desire to avoid assuming jurisdiction over the lawfulness of arms-length utility contracts. *See* Pet. at 20 n.27. An agency adopting a limiting construction of a governing statute which, as our unrebutted petition shows, conflicts with its own precedent and judicial decisions, is under almost irresistible institutional pressure to avoid the subsequent issue by fact findings that in effect render its statutory holdings irrelevant. *See infra* ¶ 2. This Court has previously held that the resolution of fact disputes in similar circumstances is inherently suspect, and should not be a bar to a controlling statement by this Court of the extent of the agency's jurisdiction. *See Schwabacher v. United States*, 334 U.S. 182, 201-02 (1948).

This Court's primary responsibility, as it well knows, is to the correct development of federal law and construction of federal statutes, not the supervision of agency fact findings in particular cases, which are entitled to deference because of expertise and lack general importance. Where an agency makes a negative conclusion of law, and then alternative and inconsistent factual findings that arguably obviate the relevance of its negative statutory holdings, it can then apply the negative statutory conclusions as controlling precedent in later cases and effectively avoid this Court's and lower courts' review of its construction of its statute and regulatory responsibilities. *Cf. Honig v. Doe*, 484 U.S. 305, 318 (1988). We believe that any reasonable scrutiny of the record in this case will demonstrate that this is exactly what occurred before the lower court here.

2. One example will illustrate that the Commission's so-called fact findings were not an adequate attempt to resolve a factual issue under an alternative (and we would contend correct) interpretation of the statute. Gulf States argued that continuation of the enforcement of the contract in its present form would almost certainly drive it into bankruptcy. The Commission rejected this argument with the speculative, and factually unsupported, observation that it was possible that state commissions would provide relief from Gulf States' current regulatory problems stemming both from the contracts and the disallowance of the investment costs of Gulf States' River Bend nuclear plant. When Gulf States was able for the first time to present concrete and *unrebutted* evidence that the state commissions had not and most probably would not provide such relief, the Commission refused to reopen to consider the evidence. Pet. App. 33a, 35a. Since this evidence directly rebutted the Commission's earlier speculation that state commission relief would obviate Gulf States' insolvency threat, it is clear that the Commission did not make a bona fide effort to consider Gulf States' possible insolvency under the alter-

native construction of the Act that (contrary to its holding) it had that responsibility.

3. The Southern Companies ("Southern") present a lengthy opposition brief that misses the point. Southern manages never to mention the Commission's *legal determination* that an inefficient mismatch of benefits and burdens is not even "germane" under Section 206 of the Federal Power Act. It taxes Gulf States (Southern Opp. at 2 n.1) with asserting factual claims that the Commission rejected, but the point of the Petition is that Gulf States is entitled to factual determinations that flow from a proper understanding of the relevant legal principles. And if the issue is germaneness, Gulf States' factual assertions must be accepted as true.

Southern's entire argument is a defense of the *result* reached by the Commission. *Id.* at 19-26. But Gulf States is not asking this Court to determine whether the Commission reached the right result; and it is not, contrary to Southern's misunderstanding (Southern Opp. at 4), asking this Court to abrogate contractual obligations. Gulf States is asking for a remand so that the Commission can reach a result that is right because it is in accordance with the correct legal principles.

Southern further taxes Gulf States for not balancing Gulf States' interests with those of Southern's stockholders and customers. *Id.* Under the proper legal principles, the interests of the seller must of course weigh in the balance. Gulf States said so in its Petition (*see* Pet. at 20 n.26; 24 n.31), and such weighing is at the very core of a comparison of benefits and burdens. The Petition should be granted in this case precisely because the Commission cannot properly weigh all relevant interests when it views a mismatch of benefits and burdens as not legally "germane." Southern fails to address, let alone justify, that statutory interpretation by the Commission, which so narrows the Commission's responsibility for efficiency and fairness in interstate bulk power sales.

This Court should resolve the important statutory issues presented by this Petition, issues with respect to which the briefs in opposition do not even make a passing attempt to demonstrate the correctness of the Commission's view.

CONCLUSION

For these reasons as well as those set out in the Petition, a writ of *certiorari* should be granted.

Respectfully submitted,

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